MICHAEL RODAK, JR., CLER

NO. 79 - 1734

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT PARRATT AND
FRANCES LUGENBILL,

Petitioners,

V.

BERT TAYLOR, JR.,

Respondent.

BRIEF FOR AMICUS CURIAE IN SUPPORT OF THE STATE OF NEBRASKA, PETITIONER

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

BARBARA C. MARQUARDT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Amicus Curiae

QUESTIONS PRESENTED

1. Whether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. §1983.

2. Whether in a property context a post deprivation state remedy is all the process that the Fourteenth Amendment requires.

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AUTHORITY TO FILE AMICUS CURIAE BRIEF

The State of Texas, through Mark White, its Attorney General, respectfully submits this brief as *amicus curiae* under the authority of Rule 36.4, United States Supreme Court Rules. It is in support of the State of Nebraska's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

INTEREST OF AMICUS CURIAE

The State of Texas has an interest in urging the Court to reverse the decision of the Court of Appeals for the Eighth Circuit because this Court's opinion will have a significant impact on the nature and scope of prisoner litigation under 42 U.S.C. §1983.

STATEMENT OF THE CASE

The State of Texas adopts and hereby incorporates the statement of the case as set forth in the State of Nebraska's brief.

ARGUMENT OF AMICUS CURIAE

1. Simple negligence may not form the basis of a judgment under 42 U.S.C. §1983.

In this action, state prison officials were sued for negligence which resulted in the loss of a prisoner's property; that is, a hobby kit valued at $23.57, without due process of law. Such a claim is not cognizable under 42 U.S.C. §1983.

This Court in *Carey v. Piphus*, 435 U.S. 247 (1978), ruled that the due process clause raises no impenetrable barrier to the taking of a person's possessions or liberty or life. Rather, it prohibits the mistaken or unjustified deprivation of life, liberty or property. Therefore, mere negligence in dealing with property does not constitute a due process violation. Arguably, the good faith immunity approved in *Wood v. Strickland*, 420 U.S. 308 (1975), and *Pierson v. Ray*, 386 U.S. 547 (1967), is recognition that something more than ordinary negligence is required to form the basis of a judgment under 42 U.S.C. §1983 against state officials. *See also*, *Procunier v. Navarette*, 434 U.S. 555, 566 (1978); *Rizzo v. Goode*, 423 U.S. 362, 375 (1976); *Washington v. Davis*, 426 U.S. 229 (1976).

Most of the circuit courts have held that simple negligence may not form the basis of a judgment under 42 U.S.C. §1983. *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. den.*, 435 U.S. 932 (1977)(prisoner's suit for loss of a trial transcript); *Stringer v. Rowe*, 616 F.2d 993 (7th Cir. 1980)(prisoner's suit for loss of personal property); *Beard v. Mitchell*, 604 F.2d 485 (7th Cir. 1978)(suit

against an FBI agent over the reckless nature of his investigation); *Secret v. Brierton*, 584 F.2d 823 (7th Cir. 1978)(prisoner's suit for deprivation of and damage to his personal property); *McDonald v. State of Illinois*, 557 F.2d 596 (7th Cir. 1977)(prisoner's suit over his homicide conviction allegedly caused by the negligence of officials); *Jones v. Diamond*, 594 F.2d 997 (5th Cir. 1979)(prisoners' challenge over the conditions of their confinement); *Tate v. Blackwell*, 475 F.2d 193 (5th Cir.), *cert. den.*, 412 U.S. 922 (1973)(inmate's suit for damages resulting from personal injuries); *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979)(suit concerning the deprivation of constitutional rights during the period of arrest and custody); *Page v. Sharpe*, 487 F.2d 567 (1st Cir. 1973)(prisoner's suit over medical care received while in custody); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1972), *cert. den. sub. nom., Employee-Officer John v. Johnson*, 414 U.S. 1033 (1973)(prisoner's suit for injuries and delay in medical treatment); *Rhodes v. Sigler*, 448 F.2d 1237 (8th Cir. 1971)(prisoner's suit for loss of $2.46 to the prison complex); *Nettles v. Rundle*, 453 F.2d 889 (3rd Cir. 1971)(per curiam)(prisoner's suit for negligence in the diagnosis and treatment of his medical complaint). *Contra, Puckett v. Cox*, 456 F.2d 233 (6th Cir. 1972). Reliance by the Court below on *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972), as support for the position that simple negligence may be the basis for an action under 42 U.S.C. §1983 was improper. In *Howell*, the court specifically refused to reach the negligence issue. *Howell v. Cataldi, supra*, at 279, n.11.

The State of Texas as *amicus curiae* urges the Court to adopt the reasoning of the majority of the circuit courts and hold that simple negligence may not form the basis of a judgment under 42 U.S.C. §1983.

2. In a property context, a post deprivation state remedy is all the process that the Fourteenth Amendment requires.

Paul v. Davis, 424 U.S. 693, *rehearing den.*, 425 U.S. 985 (1976), involving an alleged liberty interest deprivation, held that a violation of state tort law isn't necessarily a deprivation of a constitutional right cognizable under 42 U.S.C. §1983. In *Ingraham v. Wright*, 430 U.S. 697 (1977), this Court ruled that where state law provided sufficient redress for junior high students who sought to challenge the schools' disciplinary procedures, the case for finding a due process violation of the constitution was not compelling.

Similarly, in *O'Grady v. Montepelier*, 573 F.2d 747 (2d Cir. 1978), a suit by landowners against city officials for damage to property, the court ruled that a right to compensation under state law does not mean that there has been a deprivation of property in the sense contemplated by the Fourteenth Amendment. *Urbano v. Calissi*, 384 F.2d 909 (3rd Cir. 1967) *cert. den.*, 391 U.S. 925 (1968), a suit by a prisoner over the taking of some personal property, held that since plaintiff set out a simple, common law offense for which relief was available under state law, his claim lacked any substantiality as a federal civil rights action.

In *Weddle v. Director, Patuxent Institution*, 405 U.S. 1036 (1972), this Court vacated and remanded the decision of the Fourth Circuit at 436 F.2d 342 (1970) that a prisoner's suit for reimbursement of property worth $3.52 was not cognizable under 42 U.S.C. §1983 in light of *Lynch v. Household Finance Corp.*, 405 U.S. 538, *rehearing den.*, 406 U.S. 911 (1972). The instant case is distinguishable from *Lynch* because the plaintiff there had a property interest which could not be redressed in state court necessitating the protection of the due process clause through 42 U.S.C. §1983, while the respondent herein has a state tort claims remedy available.

Courts have recognized that there is a *de minimis* level of imposition on due process interests with which the constitution is not concerned. *Ingraham v. Wright*,

supra; O'Grady v. Montepelier, supra; Johnson v. Glick, supra; Nickens v. White, 536 F.2d 802 (8th Cir. 1976); *Pitts v. Griffin,* 518 F.2d 72 (8th Cir. 1975); *Kimble v. Department of Corrections, State of Michigan,* 411 F.2d 990 (6th Cir. 1969); *Howard v. Higgins,* 379 F.2d 227 (10th Cir. 1967)(per curiam).

The State of Texas urges this Court to rule that considering the *de minimis* nature of the property interest in this case and the fact that a state tort claims remedy is available to redress the complaint, the respondent's constitutional right to due process has not been violated.

CONCLUSION

It is not the function of the federal courts to run prisons or to control the ordinary internal management and disciplining of individual inmates. *United States ex rel. Wagner v. Ragen,* 213 F.2d 294 (7th Cir.), *cert. den.,* 348 U.S. 846, *rehearing den.,* 348 U.S. 884 (1954), *cert. dismissed, Wagner v. Stratton,* 350 U.S. 926 (1955); *Sawyer v. Sigler,* 445 F.2d 818 (8th Cir. 1971); *Rhodes v. Sigler,* 448 F.2d 1237 (8th Cir. 1971); *Howard v. Swenson,* 426 F.2d 277 (8th Cir.), *cert. den.,* 400 U.S. 948 (1970).

The State of Texas as *amicus curiae* urges this Court to reverse the decision of the Court of Appeals for the Eighth Circuit in light of the above policy, the *de minimis* nature of the claimed property interest, the availability of a state tort claims remedy and the fact that mere negligence is the basis for the liability.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

Barbara C. Marquardt
by Susan J. Dunlap

BARBARA C. MARQUARDT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Amicus Curiae